

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

STEVEN D. WARNER,

Plaintiff,

v.

**Civil Action 3:24-cv-287
Judge Michael J. Newman
Magistrate Judge Chelsey M. Vascura**

**A.P.A. OFFICER ASHLEY HENSCHEN,
et al.,**

Defendants.

ORDER and REPORT AND RECOMMENDATION

Plaintiff, Steven D. Warner, an Ohio inmate who is proceeding without the assistance of counsel, brings this action under 42 U.S.C. § 1983 against three Montgomery County Adult Parole Authority officers, alleging that the officers confiscated and refused to return Plaintiff's personal property in violation of the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution as well as Article I, Sections 1, 14, and 16 of the Ohio Constitution. This matter is before the Court for the initial screen of Plaintiff's Complaint under 28 U.S.C.

§§ 1915(e)(2) and 1915A to identify cognizable claims and to recommend dismissal of Plaintiff's Complaint, or any portion of it, which is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915(e)(2), 1915A(b)(1)–(2); *see also McGore v. Wrigglesworth*, 114 F.3d 601, 608 (6th Cir. 1997). Having performed the initial screen, the undersigned

RECOMMENDS that Plaintiff's federal claims be **DISMISSED** for failure to state a claim on

which relief can be granted, and that Plaintiff's Ohio claims be **DISMISSED WITHOUT PREJUDICE** to re-filing in state court.

This matter is also before the Court for consideration of Plaintiff's motion for leave to proceed *in forma pauperis* under 28 U.S.C. § 1915(a)(1) and (2), which is **GRANTED**. (ECF No. 1.) Plaintiff is required to pay the full amount of the Court's \$350 filing fee. 28 U.S.C. § 1915(b)(1). Plaintiff's certified trust fund statement reveals that he has \$0.29 in his prison account, which is insufficient to pay the filing fee.

Pursuant to 28 U.S.C. § 1915(b)(1), the custodian of Plaintiff's inmate trust accounts (Inmate ID Number A818096) at the Madison Correctional Institution is **DIRECTED** to submit to the Clerk of the United States District Court for the Southern District of Ohio as an initial partial payment, 20% of the greater of either the average monthly deposits to the inmate trust account or the average monthly balance in the inmate trust account, for the six months immediately preceding the filing of the Complaint.

After full payment of the initial, partial filing fee, the custodian shall submit 20% of the inmate's preceding monthly income credited to the account, but only when the amount in the account exceeds \$10.00, until the full fee of \$350.00 has been paid to the Clerk of this Court. 28 U.S.C. § 1915(b)(2). *See McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997).

Checks should be made payable to: Clerk, United States District Court. The checks should be sent to:

Prisoner Accounts Receivable
260 U.S. Courthouse
85 Marconi Boulevard
Columbus, Ohio 43215

The prisoner's name and this case number must be included on each check.

It is **ORDERED** that Plaintiff be allowed to prosecute his action without prepayment of fees or costs and that judicial officers who render services in this action shall do so as if the costs had been prepaid. The Clerk of Court is **DIRECTED** to mail a copy of this Order to Plaintiff and the prison cashier's office.

I. STANDARD OF REVIEW

Congress enacted 28 U.S.C. § 1915, the federal *in forma pauperis* statute, seeking to “lower judicial access barriers to the indigent.” *Denton v. Hernandez*, 504 U.S. 25, 31 (1992). In doing so, however, “Congress recognized that ‘a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits.’” *Id.* at 31 (quoting *Neitzke v. Williams*, 490 U.S. 319, 324 (1989)). To address this concern, Congress included subsection (e), which provides in pertinent part as follows:

- (2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

* * *

(B) the action or appeal—

(i) is frivolous or malicious; [or]

(ii) fails to state a claim on which relief may be granted. . . .

28 U.S.C. § 1915(e)(2)(B)(i) & (ii); *Denton*, 504 U.S. at 31. Thus, § 1915(e) requires *sua sponte* dismissal of an action upon the Court's determination that the action is frivolous or malicious, or upon determination that the action fails to state a claim upon which relief may be granted. *See also* 28 U.S.C. § 1915A (requiring a court to conduct a screening of “a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity . . . [to] identify cognizable claims or dismiss the complaint, or any portion

of the complaint [that is] frivolous, malicious, or fails to state a claim upon which relief may be granted”).

Further, to properly state a claim upon which relief may be granted, a plaintiff must satisfy the basic federal pleading requirements set forth in Federal Rule of Civil Procedure 8(a). *See also Hill v. Lappin*, 630 F.3d 468, 470–71 (6th Cir. 2010) (applying Federal Rule of Civil Procedure 12(b)(6) standards to review under 28 U.S.C. §§ 1915A and 1915(e)(2)(B)(ii)). Under Rule 8(a)(2), a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Thus, Rule 8(a) “imposes legal *and* factual demands on the authors of complaints.” *16630 Southfield Ltd., P’Ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 503 (6th Cir. 2013).

Although this pleading standard does not require “detailed factual allegations, a pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action” is insufficient. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). A complaint will not “suffice if it tenders naked assertion devoid of further factual enhancement.” *Id.* (cleaned up). Instead, to state a claim upon which relief may be granted, “a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face.” *Id.* (cleaned up). Facial plausibility is established “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “The plausibility of an inference depends on a host of considerations, including common sense and the strength of competing explanations for the defendant’s conduct.” *Flagstar Bank*, 727 F.3d at 504 (citations omitted). Further, the Court holds *pro se* complaints “to less stringent standards than formal pleadings drafted by lawyers.” *Garrett v. Belmont Cty. Sheriff’s Dep’t*, 374 F. App’x 612, 614 (6th Cir. 2010) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). This lenient

treatment, however, has limits; “courts should not have to guess at the nature of the claim asserted.” *Frengler v. Gen. Motors*, 482 F. App’x 975, 976–77 (6th Cir. 2012) (quoting *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989)).

II. ANALYSIS

Plaintiff alleges that on November 10, 2022, Defendants searched his residence and confiscated \$9,000 in cash and two smartphones. (Compl., ECF No. 1-1, at PAGEID #18.) Contemporaneously, Plaintiff was arrested and charged with several parole violations involving possession of drugs and firearms, as well as “fail[ure] to comply with a search of your property (i.e. Cell phone, etc.) by your parole officer/Adult Parole Authority.” (Notice of Findings of Release Violation Hearing, ECF No. 1-1, at PAGEID #26.) The cash and smartphones were never used by Defendants in any subsequent criminal, forfeiture, or parole proceedings. When Plaintiff’s mother contacted the Montgomery County Adult Parole Authority to request that the cash and smartphones be returned, Defendants denied ever having been in possession of the cash and denied current possession of the smartphones. (Compl., ECF No. 1-1, at PAGEID #18.) Plaintiff contends that Defendants’ conduct violated his Fourth Amendment right to be free of unreasonable seizures, his Fifth and Fourteenth Amendment rights to be free of property deprivation without due process of law, and his rights under the Ohio Constitution. (*Id.* at PAGEID #19.) Plaintiff seeks compensatory and punitive damages. (*Id.* at PAGEID #15.)

Plaintiff’s United States Constitutional claims must be dismissed. In order to plead a cause of action under 42 U.S.C. § 1983, a plaintiff must plead two elements: (1) a deprivation of a right secured by the Constitution or laws of the United States, and (2) the deprivation was caused by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 534 (6th Cir. 2008) (citing *McQueen v. Beecher Cmty. Sch.*, 433 F.3d 460, 463 (6th Cir. 2006)).

The Fourth Amendment proscribes “unreasonable searches and seizures” U.S. Const. amend. IV. Thus, “[t]he ultimate touchstone” when evaluating claims under the Fourth Amendment “is reasonableness.” *Michigan v. Fisher*, 558 U.S. 45, 47 (2009) (internal quotation marks and citations omitted); *see also Collins v. Nagle*, 892 F.3d 489, 494 (6th Cir. 1989) (considering whether the “decision to impound was reasonable under the circumstances” within the context of evaluating the plaintiff’s Fourth Amendment seizure claim (citations omitted)). Here, Plaintiff alleges no facts on which the Court could rely to conclude that Defendants’ search of Plaintiff’s residence or seizure of the cash or smartphones was unreasonable. The documents attached to Plaintiff’s Complaint reflect that the search was lawfully conducted by the Montgomery County Adult Parole Authority as part of Plaintiff’s parole supervision conditions. (See Notice of Findings of Release Violation Hearing, ECF No. 1-1, at PAGEID #26–27.) Nor does Plaintiff contest the validity of his arrest. Accordingly, Plaintiff has not pleaded facts sufficient to raise a plausible inference that his Fourth Amendment rights were violated by the initial seizure of the cash and smartphones. *See Iqbal*, 556 U.S. at 678.

Nor does Defendants’ refusal to return the cash or smartphones give rise to a Fourth Amendment claim. In *Fox v. Van Oosterum*, the United States Court of Appeals for the Sixth Circuit held that the plaintiff had no Fourth Amendment claim based on police seizing his wallet and refusing to return his driver’s license contained in the wallet. 176 F.3d 342, 349–53 (6th Cir. 1999). “The refusal to return the license here neither brought about an additional seizure nor changed the character of the [prior] seizure from a reasonable one to an unreasonable one because the seizure was already complete when the defendants refused to return the license.” *Id.* at 350. “[T]he Fourth Amendment protects an individual’s interest in retaining possession of property but not the interest in regaining possession of property.” *Id.* at 351. “Once that act of

taking the property is complete, the seizure has ended and the Fourth Amendment no longer applies.” *Id.* Therefore, under *Fox*, Plaintiff cannot make out a Fourth Amendment claim based on Defendants’ refusal to return his property.

Plaintiff’s Fifth Amendment claim for deprivation of property without due process of law must also be dismissed. The Fifth Amendment applies only to claims against federal employees. Here, Plaintiff has sued only employees of Montgomery County, Ohio, who cannot be liable under the Fifth Amendment. *See Scott v. Clay Cnty., Tenn.*, 205 F.3d 867, 873 n.8 (6th Cir. 2000) (noting that a § 1983 plaintiff’s Fifth Amendment claim against state employees “was a nullity, and redundant of her invocation of the Fourteenth Amendment Due Process Clause”). Plaintiff therefore cannot succeed on his Fifth Amendment claim.

Plaintiff’s Fourteenth Amendment claim for deprivation of property without due process of law is also deficient because Plaintiff has not alleged the inadequacy of the remedies available under Ohio law. *See Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part by Daniels v. Williams*, 474 U.S. 327 (1986) and *Hudson v. Palmer*, 468 U.S. 517 (1984). In *Parratt*, the United States Supreme Court held that the existence of adequate post-deprivation state remedies eliminates any due process claim arising from the negligent deprivation of a prisoner’s property. 451 U.S. at 539–44. The *Hudson* Court extended *Parratt*’s application to all § 1983 due process claims involving deprivation of property, regardless of whether the deprivation is negligent or intentional. *Hudson*, 468 U.S. at 533–36. *Cf. Jefferson v. Jefferson Cnty. Pub. Sch. Sys.*, 360 F.3d 583, 587–88 (6th Cir. 2004) (“If satisfactory state procedures are provided in a procedural due process case, then no constitutional deprivation has occurred despite the injury.”). Following *Parratt* and *Hudson*, the United States Court of Appeals for the Sixth Circuit held that in a § 1983 case “claiming the deprivation of a property interest without procedural due process of

law, the plaintiff must plead and prove that state remedies for redressing the wrong are inadequate.” *Vicory v. Walton*, 721 F.2d 1062, 1065–66 (6th Cir. 1983). When a plaintiff fails to do so, dismissal for failure to state a claim is appropriate. *See, e.g., Gibbs v. Hopkins*, 10 F.3d 373, 377-78 (6th Cir. 1993) (dismissal of procedural due process claim upheld when the plaintiff had “not pled or shown that [the state] judicial remedies are inadequate”); *Ruiz v. Fisher*, No. 96-4212, 1998 WL 661139, at *5 (6th Cir. Sept. 2, 1998) (concluding that the plaintiff had failed to state a claim of either intentional or negligent deprivation of property where he had not pled “that state remedies for redressing the wrong [were] inadequate”).

Plaintiff’s Complaint provides insufficient factual content or context from which the Court could reasonably infer that Ohio’s post-deprivation tort remedies are inadequate under *Parratt* and *Vicory* to adjudicate his property-deprivation claim. *See Fox*, 176 F.3d at 349 (citing *Hudson*, 468 U.S. at 534–36) (“State tort remedies generally satisfy the postdeprivation process requirement of the Due Process Clauses.”). Accordingly, he has failed to state a Fourteenth Amendment property-deprivation due process claim.

Finally, the undersigned recommends that the Court decline to exercise jurisdiction over Plaintiff’s remaining state-law claims for violation of the Ohio Constitution. Under 28 U.S.C. § 1367(c)(3), the Court may decline to exercise supplemental jurisdiction when the Court “has dismissed all claims over which it has original jurisdiction.” The United States Court of Appeals for the Sixth Circuit has held that “[i]f the federal claims are dismissed before trial, the state claims generally should be dismissed as well.” *Brooks v. Rothe*, 577 F.3d 701, 709 (6th Cir. 2009) (citations omitted). Here, Plaintiff’s allegations related to the Ohio Constitution fail to provide a basis for a claim over which this Court has original jurisdiction. “The basic statutory grants of federal court subject-matter jurisdiction are contained in 28 U.S.C. § 1331, which

provides for federal-question jurisdiction, and § 1332, which provides for diversity of citizenship jurisdiction.” *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 501 (2006) (cleaned up). Federal-question jurisdiction is implicated when a plaintiff pleads a claim “arising under” the federal laws or the United States Constitution. *Id.* (citation omitted). For a federal court to have diversity jurisdiction under § 1332(a), there must be complete diversity, meaning that each plaintiff must be a citizen of a different state than each defendant, and the amount in controversy must exceed \$75,000. *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 68 (1996).

Plaintiff’s claims under the Ohio Constitution pertain squarely to state law and do not arise under federal laws or the United States Constitution. Nor has Plaintiff alleged that he and Defendants are citizens of different states. Thus, Plaintiff has failed to plausibly allege facts on which the Court could rely to conclude that this Court has original subject-matter jurisdiction over his state-law claims. Because the undersigned is recommending dismissal of all of Plaintiff’s federal claims, it is further recommended that the Court decline to exercise supplemental jurisdiction over any remaining state-law claims and that it dismiss any such claims without prejudice to filing in state court.

III. DISPOSITION

For these reasons, Plaintiff’s motion for leave to proceed *in forma pauperis* (ECF No. 1) is **GRANTED**. The undersigned **RECOMMENDS** that Plaintiff’s federal claims be **DISMISSED** for failure to state a claim on which relief can be granted, and that Plaintiff’s Ohio claims be **DISMISSED WITHOUT PREJUDICE** to re-filing in state court.

PROCEDURE ON OBJECTIONS

If any party objects to this Report and Recommendation, that party may, within fourteen (14) days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A District Judge of this Court shall make a *de novo* determination of those portions of the Report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a District Judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to have the District Judge review the Report and Recommendation *de novo*, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

IT IS SO ORDERED.

/s/ Chelsey M. Vascura
CHELSEY M. VASCURA
UNITED STATES MAGISTRATE JUDGE